

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY**

ANDY KIM, et al.,

Plaintiffs,

v.

CHRISTINE GIORDANO HANLON,
in her official capacity as Monmouth
County Clerk, et. al.,

Defendants.

- and -

DALE A. CROSS, in his official
capacity as Salem County Clerk, et al.,

as Interested Parties.

Civil Action No.: 24-1098 (ZNQ)(TJB)

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION IN
LIMINE NO. 3 TO EXCLUDE THE INTRODUCTION OR USE OF THE
EXPERT REPORT OF ANDREW W. APPEL**

Of Counsel and on the brief:

Angelo J. Genova, Esq.

Rajiv D. Parikh, Esq.

Jennifer Borek, Esq.

On the brief:

Daniel A. Lebersfeld, Esq.

Katherine Szabo, Esq.

GENOVA BURNS LLC

494 Broad Street

Newark, New Jersey 07102

Tel: (973) 533-0777

Fax: (973) 533-1112

Attorneys for Defendants

*Christopher Durkin, Joanne Rajoppi,
and Danielle Ireland-Imhof*

TABLE OF CONTENTS

TABLE OF AUTHORTIES	iii
ARGUMENT	1
MR. APPEL’S TESTIMONY IS NOT RELEVANT TO THE ISSUES IN CONTROVERSY AT THE PRELIMINARY INJUNCTION HEARING.....	1
CONCLUSION	3

TABLE OF AUTHORTIES

CASES

Daubert v. Merrell Dow Pharms., Inc.,
509 U.S. 579 (1993)1

Merrill v. Milligan,
142 S. Ct. 879 (2022).....2

RULES

Fed. R. Evid. 401 and 702.....1

Fed. R. Evid. 702(a)1

Defendants Christopher Durkin, Joanne Rajoppi, and Danielle Ireland-Imhof, in their official capacities, respectfully submit this memorandum of law in support of their motion, pursuant to Fed. R. Evid. 401 and 702, and *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993), to exclude the testimony of Andrew W. Appel (“Appel”), the proffered expert witness of Plaintiffs.

ARGUMENT

MR. APPEL’S TESTIMONY IS NOT RELEVANT TO THE ISSUES IN CONTROVERSY AT THE PRELIMINARY INJUNCTION HEARING.

Fed. R. Evid. 401(b) provides that “[e]vidence is relevant if... the fact is of consequence in determining the action.” Fed. R. Evid. 702(a) incorporates this standard with respect to expert opinion testimony in requiring that a putative “expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue[.]” As the Supreme Court in *Daubert* recognized, “[t]his condition goes primarily to relevance” since “[e]xpert testimony which does not relate to any issue in the case is not relevant and, ergo, non-helpful.” 509 U.S. at 591 (quoting 3 J. Weinstein & M. Berger, *Weinstein’s Evidence* ¶ 702[02], p. 702-18). That is, “scientific validity for one purpose is not necessarily scientific validity for other unrelated purposes.” *Id.* (citation omitted).

Mr. Appel's report (Complaint Ex. E, Dkt. #1-5) ("Report") and his expected testimony is not relevant to the issues before the Court. Indeed, Mr. Appel's report and testimony will not help the Court as the trier of fact because he only concludes that certain voting machines used in different counties are capable of "support[ing] an office-block ballot and are used with office-block formats in other states." (Report, p.6). Whether voting machines used in New Jersey counties can support an "office-block ballot" format does not speak to the issue for which Plaintiffs have indicated they intend to use Appel's testimony; whether injunctive relief, if granted would result in great harm to Defendants as the nonmovants. (*See* Plaintiffs' Brief In Support of Motion for Preliminary Injunction (Dkt. # 5-1) at 51-52).

This is because whether changes to the ballot and related reprogramming of voting machines can be accomplished is not at issue. Instead, the relevant inquiry is whether changes to the primary ballot design articulated in State law and used in New Jersey for decades for primary elections *can be effectuated by the April 6, 2024 deadline* for the approval of the primary ballot design, or that such a drastic change in the middle of the primary election process that started in January is "at least feasible before the election without significant cost, confusion, or hardship." *Merrill v. Milligan*, 142 S. Ct. 879, 880 (2022) (Kavanaugh, *J.* concurring) (citations omitted). Mr. Appel's report does not speak to these critical issues, which involve knowledge of not only ballot design and printing and voting machine design, but

also the Federal and State statutory procedures and technical work that must be undertaken by State elections officials, State government officials responsible for appropriations, voting machine suppliers/vendors, the custodians of the machines, and election security personnel, among others, who are necessary to implement those changes. Mr. Appel's testimony does not touch upon any of these factors, instead focusing on feasibility of elections machines to handle different types and styles of ballots assuming there is adequate time to configure same. For this straightforward reason, Mr. Appel's testimony should be barred.

CONCLUSION

For the foregoing reasons, Defendants Christopher Durkin, Joanne Rajoppi, and Danielle Ireland-Imhof respectfully request that the Court grant their motion in *limine* and exclude Andrew W. Appel's reports and testimony in this matter.

Respectfully submitted,

GENOVA BURNS LLC

Attorneys for Defendants,

*Christopher Durkin, Joanne Rajoppi,
and Danielle Ireland-Imhof*

By: *s/ Angelo J. Genova*

ANGELO J. GENOVA

RAJIV D. PARIKH

JENNIFER BOREK

Dated: March 18, 2024

17465316v1 (1154.215)